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10 UNITED STATES DISTRICT COURT
11 WESTERN DISTRICT OF WASHINGTON
12 AT TACOMA

12 JEFFREY R. McKEE,

13 Plaintiff,

14 v.

15 LOREN TAYLOR et al.,

16 Defendants.
17

No. 09-5207RJB

REPORT AND RECOMMENDATION

**NOTED FOR:
November 27, 2009**

18 This 42 U.S.C. §1983 Civil Rights matter has been referred to the undersigned Magistrate
19 Judge pursuant to 28 U.S.C. §§ 636(b)(1)(A) and 636(b)(1)(B) and Local Magistrate Judges'
20 Rules MJR 1, MJR 3, and MJR 4.

21 This matter comes before the court on defendant's motion to dismiss (Dkt. # 33). This
22 action has been consolidated with 09-CV-5208. Plaintiff has not responded to the motion to
23 dismiss despite being given a sixty-day extension of time. Instead, plaintiff has filed another
24 motion for an additional sixty-day extension of time (Dkt. # 38). That motion has been denied
25 by separate order.
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REPORT AND RECOMMENDATION- 1

1 This action challenges an infraction plaintiff received at the Stafford Creek Corrections
2 Center. Plaintiff was found guilty of violating WAC 137-28-220 (304). This section of the
3 Washington Administrative Code prohibits unwanted written and telephonic communications to
4 any person. Plaintiff sent a letter to a counselor, defendant Taylor, when he allegedly learned the
5 counselor had told another inmate that plaintiff did nothing for free. (Dkt. # 7, page 3). A copy
6 of the letter allegedly sent to defendant Taylor is attached to the complaint (09-CV-5207 Dkt. #
7 7, Exhibit 1).

9 Plaintiff was infractioned, found guilty, and sanctioned to 10 days loss of his typewriter and 5
10 days of cell confinement (09-CV-5207 Dkt. # 7, Exhibit 3). This was a general infraction, not a
11 serious infraction. Loss of good time or earned time was not an available sanction. In the
12 infraction defendant Taylor states she found the letter sent from Mr. McKee threatening (Dkt. #
13 7, Exhibit 3). Plaintiff was informed that if he needed a typewriter for court during the ten day
14 loss of his typewriter he should contact his counselor and make arrangements to use one in the
15 law library (09-CV-5207 Dkt. # 7, Exhibits 5).

17 Case #09-CV-5208 challenged use of the grievance procedures and photocopy policies.
18 Plaintiff alleges a denial of access to courts as a result of a delay in obtaining photocopies, (09-
19 CV-5208, Dkt. # 5 page 2). Plaintiff does not allege facts showing any actual injury. Plaintiff
20 alleges his actual injury was a five-day delay in the submission of a complaint to court (09-CV-
21 5208 Dkt. # 5, page 5).

23 Plaintiff alleges a denial of his first amendment right to petition government (09-CV-
24 5207 Dkt # 7, page 6). He alleges a denial of access to courts. He also alleges a violation of his
25 right to due process in that he claims there is no evidence supporting the finding of guilt (09-CV-
26 5207 Dkt. # 7, page 6). He also alleges an equal protection violation, but fails to allege he is part

1 of a suspect class (09-CV-5207 Dkt. # 7, page 7). The final allegation is that there is “sub-
2 conspiracy” to obstruct plaintiff’s efforts to use the grievance system and document staff
3 misconduct through complaints (09-CV-5207 Dkt. # 7, page 5). Plaintiff alleges a denial of
4 access to courts and a conspiracy to obstruct his use of the grievance system in 09-CV-5208.

5 STANDARD OF REVIEW

6 Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) provides that a court should
7 dismiss a claim under Fed. R. Civ. P. 12(b)(6) either because of the lack of a cognizable legal
8 theory or because of the absence of sufficient facts alleged under a cognizable legal theory.
9 Balistreri v. Pacifica Police Department, 901 F.2d 696, 699 (9th Cir. 1990).

11 For purposes of ruling on this motion, material allegations in the complaint are taken as
12 admitted and the complaint is construed in the plaintiff’s favor. Keniston v. Roberts, 717 F.2d
13 1295 (9th Cir. 1983). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not
14 need detailed factual allegations, a plaintiff’s obligation to provide the grounds of his entitlement
15 to relief requires more than labels and conclusions, and a formulaic recitation of the elements of
16 a cause of action will not do.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955,
17 1964-65 (2007)(internal citations omitted). “Factual allegations must be enough to raise a right to
18 relief above the speculative level, on the assumption that all the allegations in the complaint are
19 true (even if doubtful in fact).” *Id.* at 1965. Plaintiffs must allege “enough facts to state a claim to
20 relief that is plausible on its face.” *Id.* at 1974.

22 DISCUSSION

23 A. *Right to Petition Government.*

24 Plaintiff alleges infracting him and finding him guilty for sending a letter to defendant
25 Taylor violates his first amendment right to petition government. The First Amendment to the
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1 Constitution applies to the states through the Fourteenth Amendment. Procunier v. Martinez,
2 416 U.S. 396 (1974). A prison inmate retains those First Amendment rights that are not
3 inconsistent with his status as a prisoner or with the legitimate penological objectives of the
4 corrections system. Pell v. Procunier, 417 U.S. 817, 822 (1974).

5 First Amendment claims are governed by the factors set forth in Turner v. Safley, 482
6 U.S. 78 (1987). O'Lone v. Shabazz, 482 U.S. 342 (1987). Under Turner v. Safley, prison
7 regulations that limit an inmate's constitutional rights are valid if they are reasonably related to
8 legitimate penological interests. Turner v. Safley, 482 U.S. 78, 89 (1987). To determine
9 whether prison regulations are valid, the court must consider (1) whether the regulation has a
10 logical connection to the legitimate government interests invoked to justify it; (2) whether there
11 are alternative means of exercising the rights that remain open to the inmates; (3) the impact that
12 accommodation of the asserted constitutional rights will have on other inmates, guards and
13 prison resources; and (4) the presence or absence of ready alternatives that fully accommodate
14 the prisoner's rights at *de minimis* costs to valid penological interests. McCabe v. Arave, 827
15 F.2d 634, 637 (9th Cir. 1987).

16 Plaintiff's letter was a demand that Taylor stop telling other inmates he did not do things
17 for free. The letter describes Taylor's statement as "slanderous". Carbon copies of the letter
18 were allegedly sent to the Superintendent and to a file.

19 A prison certainly has a legitimate penological goal in preventing inmates from sending
20 unwanted mail to persons, even if the persons are prison employees. Further, Defendant Taylor
21 indicates in the infraction that the letter was threatening. Mr. McKee has alternative means of
22 asserting his alleged right, in fact, the grievance policy sets forth the procedure where an inmate
23 is supposed to speak with the staff member informally -- not send them a letter.
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1 Prison officials must have the ability to address unwanted correspondence to persons,
2 whether those persons work for the prison or not. Applying these applicable factors the court
3 concludes the actions taken by defendants in infracting plaintiff for his correspondence was
4 constitutional, even if it imposed a restraint on plaintiff's right to petition government.

5 B. *Access to Court.*
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7 Neither the denial of "emergency photocopies" nor the sanction of loss of his typewriter
8 for ten days denied plaintiff access to courts or the right to petition government. Under the facts,
9 as set forth by plaintiff, photocopies for inmates at Stafford Creek Corrections Center are made
10 on Tuesdays and Thursdays (09-CV-5208 Dkt. # 5). Plaintiff demanded "emergency
11 photocopies." His request was denied and he had to wait five days for the photocopies (09-CV-
12 5208 Dkt. # 5). He does not allege he missed any court imposed deadline or was unable to file
13 the "emergency motion for a TRO" that he wished to file.
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15 In 09-CV-5207 plaintiff lost the use of his personal typewriter for ten days as a sanction
16 for a letter he sent a counselor. He was specifically informed that if he needed a typewriter for
17 legal work he should contact his counselor and make arraignments to use a typewriter in the law
18 library (09-CV-5207 Dkt. # 7, Exhibit 5).

19 The Supreme Court has held that prisoners have a constitutional right of meaningful
20 access to the courts premised on the Due Process Clause. Bounds v. Smith, 430 U.S. 817, 821
21 (1977). Such access requires prison authorities to "assist inmates in the preparation and filing of
22 meaningful legal papers by providing prisoners with adequate law libraries or adequate legal
23 assistance from persons trained in the law." Bounds, 430 U.S. at 828 (emphasis added); Storseth
24 v. Spellman, 654 F.2d 1349, 1352 (9th Cir. 1981).
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1 The Ninth Circuit has determined that "right of access" claims that do not allege
2 inadequacy of the law library or inadequate assistance from persons trained in the law, must
3 allege an "actual injury" to court access. Sands v. Lewis, 886 F.2d 1166, 1171 (9th Cir. 1989).
4 An "actual injury" consists of some specific instance in which an inmate was actually denied
5 access to the courts. Id. Only if an actual injury is alleged may plaintiffs' claim survive. Id. A
6 five day delay in providing copies and loss of typewriter privileges for ten days where a
7 typewriter is available in the law library and no court imposed deadlines are at issue simply fails
8 to state a claim.

10 C. *General infractions and Due Process.*

11 The Supreme Court held that due process in a disciplinary hearing applies if the inmate
12 has a state created liberty interest at stake. Wolff v. Mc Donald, 418 U.S. 539 (1974). Plaintiff
13 has failed to allege or show any liberty interest is at stake. Defendants move to dismiss and note:

15 Plaintiff's sole basis for claiming a due process violation is the conduct of a
16 disciplinary hearing wherein he was sanctioned with a penalty of cell confinement
17 and having his typewriter taken away for a period of time. An inmate's constitutional
18 rights are implicated only when he faces restraint that "imposes atypical and
19 significant hardship on the inmate in relation to the ordinary incidents of prison life."
20 Sandin v. Conner, 515 U.S. 472, 486 (1995). Segregation generally falls within
21 the expected parameters of the sentence imposed by a court of law. Sandin, 515
22 U.S. at 484-486 (imposition of disciplinary segregation does not amount to
23 atypical and significant hardship); Wolff v. McDonnell, 418 U.S. 539, 571-72 n.9
24 (1974) (rights afforded inmates for facing loss of good-time not necessarily
25 required for lesser penalties); see also Smith v. Noonan, 992 F.2d 987, 989 (9th
26 Cir. 1993) (Washington inmates have no protected liberty interest to be free from
administrative segregation). If the loss of good-conduct time and placement in
segregation do not rise to the level of a due process violation, then the lesser
sanctions of being confined to one's cell and losing the privilege of using a
typewriter certainly do not. Plaintiff's Fourteenth Amendment due process claim
fails as a matter of law.

25 Plaintiff also alleges that he did not receive the requisite due process in his
26 disciplinary hearing. In a prison disciplinary hearing, an inmate is entitled only to
minimal due process protections. In re Plunkett, 57 Wn. App. 230, 235, 788 P.2d
1090 (1990). In Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d

1 935 (1974), the Supreme Court set forth the due process rights of a prison inmate
2 at a disciplinary proceeding where a state created liberty is at issue. Although the
3 court held that such prisoners do not enjoy the full panoply of due process
4 safeguards, it also held that a prisoner is entitled to: (1) written notice of the
5 charges against him at least 24 hours in advance of the hearing; (2) an opportunity
6 to call witnesses and present documentary evidence in his defense, provided that
7 doing so will not be unduly harmful to institutional safety or correctional goals;
8 and (3) a written statement setting forth the disciplinary board's findings of fact.
Wolff, 418 U.S. at 563-66. Plaintiff's own exhibits demonstrate that he received
written notice of the charges against him, 24 hours in advance, that he presented
evidence, and that he received a written statement documenting the findings
made. See Plaintiff's Complaint, Exhibits 2 and 3. Therefore, his due process
claim must fail as a matter of law.

9 (09-CV-5207 Dkt. # 33, pages 6 and 7). As no liberty interest was at stake in the general
10 infraction, plaintiff's due process claim fails as a matter of law. Despite the fact that no liberty
11 interest was at stake, plaintiff received written notice of the charge 24 hours in advance of the
12 hearing, the opportunity to present a defense, and written findings.

13 D. *Equal protection.*

14 The Equal Protection clause requires that all persons similarly situated be treated
15 similarly by the government. Inmates are protected under the Equal Protection Clause against
16 invidious discrimination. Wolff v. McDonnell, 418 U.S. 539, 556 (1974); Lee v. Washington,
17 390 U.S. 333, 334 (1968). Conclusory allegations, by themselves, however, do not establish an
18 equal protection violation without proof of invidious discriminatory intent. See Village of
19 Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977). Moreover,
20 when a suspect class is not implicated the court must determine whether the alleged
21 discrimination is “patently arbitrary and bears no rational relationship to a legitimate
22 governmental interest.” Vermouth v. Corrothers, 827 F.2d 599, 602 (9th Cir. 1987)(quoting
23 Young v. United States Parole Comm’n, 682 F.2d 1105, 1109 (5th Cir.), cert. denied, 459 U.S.
24 1021 (1982)).
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1 Plaintiff alleges other inmates involved in the same conduct as he were not infracted. He
2 provides no details, does not provide copies of letters these other inmates sent defendant Taylor,
3 and this claim is conclusory. Further, as no suspect class is involved, plaintiff must show the
4 action taken is patently arbitrary and bears no legitimate interest to a legitimate penological goal.
5 He sent a letter to a counselor that the counselor perceived as threatening. Plaintiff was infracted
6 for his conduct. Plaintiff's claim fails as a matter of law.

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8 E. *The grievance process.*

9 As defendants note there is no constitutional right to a grievance process. Mann v.
10 Adams, 855 F.2d 639 (9th Cir. 1988). Further, because there is no right to a grievance system,
11 failure on the part of prison officials to follow the procedures in the system does not give rise to
12 a claim under 42 U.S.C. 1983 under most circumstances. Hoover v. Watson, 886 F. Supp. 410
13 (D. Del. 1995), aff'd, 74 F.3d 1226; Brown v. Dodson, 863 F. Supp. 284, 285 (W.D. Va. 1994);
14 Allen v. Wood, 970 F. Supp. 824, 832 (E.D. Wash. 1997).

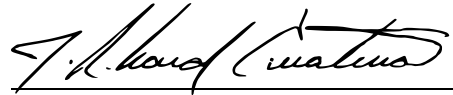
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16 Plaintiff in 09-5208 alleges that he filed an emergency grievance, but prison officials
17 determined the issue was not an emergency and refused to process his grievance as an
18 emergency grievance. Plaintiff has failed to show that a five day delay in obtaining copies was
19 an emergency and his claim fails as a matter of law.

20 CONCLUSION

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22 This court recommends that defendant's motion to dismiss be GRANTED. This action
23 should be dismissed for failure to state a claim. This dismissal should count as a strike pursuant
24 to 28 U.S.C. 1915. Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of
25 Civil Procedure, the parties shall have ten (10) days from service of this Report to file written
26 objections. *See also*, Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those

1 objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the
2 time limit imposed by Rule 72(b), the clerk is directed to set the matter for consideration on
3 **November 27, 2009**, as noted in the caption.

4 DATED this 2nd day of November, 2009.

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8 J. Richard Creatura
9 United States Magistrate Judge
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